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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Canyon Area Residents for the Environment) ET Docket No. 99-267
Request for Review of Action Taken Under)
Delegated Authority on a Petition for)
an Environmental Impact Statement)

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB") hereby submits these reply comments in response to the Commission's Public Notice, DA 99-1211, released June 25, 1999,¹ seeking comments on a letter from the Advisory Council on Historic Preservation ("ACHP") relating to a proposed communications transmission facility located at Lookout Mountain, Colorado, which the Commission has elected to treat as a Petition for Reconsideration.²

Since the FCC's environmental processing rules comply with the National Historic Preservation Act, the Commission should deny the relief requested by ACHP in its letter. NAB notes that local authorities, relying on meritless legal issues previously resolved by the FCC, have now succeeded in causing three Denver network affiliates to miss the Commission's November 1,

¹ "FCC to Seek Comments on a Letter from the Advisory Council on Historic Preservation Relating to Communications Transmission Facilities Located at Lookout Mountain, CO", Public Notice, DA 99-1211 (Released: June 25, 1999) (corrected version). On July 22, 1999, the Commission granted a request for extension of time to file comments and reply comments. See Public Notice, DA 99-1435, "FCC to Grant Extension of Time to File Comments on a Letter from the Advisory Council on Historic Preservation Relating to Communications Transmission Facilities Located at Lookout Mountain, CO" (Released: July 22, 1999).

² According to the Public Notice, DA 99-1211, the Commission is treating the two-page letter from ACHP dated June 3, 1999, as a Petition for Reconsideration.

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1999 DTV construction deadline. This proceeding highlights, quite dramatically, the fact that, if the Commission continues to shirk its duty to protect the federal interest in siting broadcast facilities, the national DTV “roll-out” will continue to be undercut and delayed by dilatory behavior on the part of state and local governments.

I. The FCC’s Environmental Processing Rules Comply With Section 106 of the National Historic Preservation Act

The question raised by ACHP in its June 3, 1999, letter, is simply whether the Commission has discharged its responsibilities under Section 106 of the National Historic Preservation Act (“NHPA”)³ with respect to a proposed new consolidated multi-user telecommunications tower (“LCG Tower”)⁴ to be constructed by Lake Cedar Group LLC (“LCG”) in connection with the digital television build-out of its constituent members. Specifically, ACHP questions whether the LCG Tower “may have the potential to affect historic properties” in and around Lookout Mountain, Colorado.

NAB concurs with LCG and BellSouth comments that the Commission’s existing environmental processing guidelines take into account potential effects on historic properties and, therefore, comply with the requirements of NHPA. Section 1.1307 of the Commission’s rules sets forth categories of facilities authorized by the Commission that may have significant environmental

³ Section 106 of the NHPA requires federal agencies, prior to the issuance of any license, to “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” 16 U.S.C. § 470(f).

⁴ The LCG tower is the proposed location for the new digital television (DTV) facilities of five Denver area television stations. In addition, several licensees of television stations in Denver plan to relocate their current analog (NTSC) antennas to the LCG tower, as do a number of FM radio stations. The proposed common tower will immediately replace two existing towers, will replace two more TV towers at the DTV conversion date, and will also replace some number of FM towers for those FM stations who chose to relocate to it.

effects.⁵ Among these categories are “[f]acilities that may affect districts, sites, buildings, structures or objects significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places.”⁶ If a proposed facility is within a category listed in § 1.1307, an applicant is required to prepare and submit with its application an analysis of environmental effects, known as an Environmental Assessment (“EA”). The Commission reviews the EA, as well as information submitted by other interested parties, and determines whether the action will likely have a significant impact that would necessitate preparation of an Environmental Impact Statement (“EIS”).

In this case, however, no EA is required because of the Commission’s longstanding policy exempting facilities to be constructed on “antenna farms” from the environmental processing requirements.⁷ This categorical exclusion creates a presumption that the location of a tower in an existing antenna farm causes no significant environmental effects, including no effect on historic sites, because of the common sense notion that the area is already dedicated to broadcast uses. Here, LCG proposes to construct its tower in the Lookout Mountain Antenna Farm—an area which has been dedicated to broadcast transmission facilities since the 1950s and which currently contains the transmission facilities of seventeen (17) separate broadcast stations!⁸ Therefore, as the Commission

⁵ 47 C.F.R. § 1.1307.

⁶ 47 C.F.R. § 1.1307(a)(4).

⁷ See Note 3 to 47 C.F.R. § 1.1306; see *Implementation of the National Environmental Policy Act of 1969*, 49 FCC 2d 1313, 1320 (1974); see also *First Century Broadcasting, Inc.*, 100 FCC 2d 761 (1985).

⁸ See LCG Comments at 3.

correctly concluded in *Memorandum Opinion and Order* in this matter, the categorical exclusion applies to LCG's application, and LCG is exempt from the EA requirement.⁹

The Commission—and, apparently, ACHP itself—have previously concluded that the Commission's environmental processing rules fully comply with the requirements of Section 106 of NHPA. In 1988, the Commission adopted several amendments to its environmental processing rules specifically designed to conform to the requirements of the NHPA.¹⁰ Among the amendments adopted by the Commission was an amendment to note 1 of Section 1.1306 to clarify that antennas built on existing structures that are historic properties or that may affect historic properties are not categorically excluded from the EA requirement.¹¹ Notwithstanding this amendment, the Commission did not deem it necessary to conform to NHPA to amend the existing categorical exclusion contained in note 3 of Section 1.1306 relating to construction in an established antenna farm. Therefore, it is plain that the Commission has specifically considered the requirements of NHPA in adopting and modifying its environmental processing rules. Moreover, the 1988 amendments to the Commission's environmental processing rules were reviewed and approved by ACHP itself, indicating that ACHP also recognized that the Commission's rules complied with the requirements of NHPA.¹²

⁹ See *Memorandum Opinion and Order*, FCC 99-123 (Released: May 27, 1999) at ¶¶ 12 and 13.

¹⁰ See *In the Matter of the Commission's Environmental Rules*, FCC 88-191, 65 Rad. Reg. 2d (P&F) 116 (Released: Aug. 16, 1988)

¹¹ *Id.* at ¶ 7.

¹² *Id.* at note 5.

As an additional environmental safeguard with respect to the categorical exclusion from the environmental processing requirements, Section 1.1308(c) of the Commission's rules allows interested parties alleging that an action, otherwise categorically excluded, will have a significant environmental effect to "submit . . . a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process."

As the Commission correctly concluded in its *Memorandum Opinion and Order*, however, the parties have not submitted any evidence showing that the LCG Tower will have adverse environmental effects nor have they provided any basis for overturning the Commission's longstanding policy encouraging construction in established antenna farms. ACHP merely alleges that the proposed project "may have potential to affect" four specified historic sites and fails to point to any specific facts suggesting that these sites will be adversely affected. Similarly, the other commenters do not offer any basis for concluding that the action will have a significant environmental effect. The only articulated harm by the commenters is purported "aesthetic" harm¹³ and potential effects of RF radiation emitted from the proposed facility.¹⁴ As regards the asserted "aesthetic" harm, NAB continues to believe that it would be inappropriate to invoke the environmental processing requirements of the Commission's rules simply because the proposed facility is not aesthetically pleasing to some person or group.¹⁵ Nonetheless, the commenters'

¹³ See, e.g., Comments of CARE at 10; Paul D. Kalkwarf at 1; Mount Vernon Country Club at 1; and Buffalo Bill Memorial Museum at 1.

¹⁴ See, e.g., Comments of CARE at 4; Mount Vernon Country Club at 1; Jefferson County Historical Commission at 1; Buffalo Bill Memorial Museum at 1; and Ergotec Association Inc., *passim*.

¹⁵ See Comments of NAB/MSTV, In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station

speculative and subjective assertions in this case are undercut by the objective evidence set forth in LCG's comments.¹⁶ The fact is that the proposed construction will result in a net reduction of the number of towers on Lookout Mountain: the LCG Tower will immediately replace two existing towers and other towers will be replaced when the conversion to DTV is complete. The diagrams and computer simulations submitted by LCG convincingly demonstrate that the LCG Tower will have *less* of an effect on historic sites than the numerous existing structures. As regards the RF radiation concerns, the Commission's existing RF radiation rules adequately protect the environment from RF radiation hazards, and the commenters have provided no basis for concluding that the proposed facility does not comply with the Commission's existing rules.

In sum, the record simply does not provide any basis for concluding that the LCG Tower will adversely affect the environment or for reconsidering the conclusion of the Commission in its *Memorandum Opinion and Order* that an EA is not required.

II. This Proceeding Demonstrates the Need for Decisive Action to Remove from Local Debate Issues Which Are Comprehensively Regulated at the Federal Level

NAB has previously advocated to the Commission the adoption of a rule preempting certain state and local government restrictions on the placement, construction and modification of broadcast transmission facilities, and the Commission has before it a pending docket looking toward the adoption of such a rule.¹⁷ The instant proceeding is a vivid demonstration of the concerns which

Transmission Facilities, MM Docket No. 97-182 (Oct. 30, 1997), at 14; Reply Comments at 53.

¹⁶ See Comments of LSG at Attachments 1-5.

¹⁷ See Petition for Further Notice of Proposed Rule Making, MM Docket No. 87-268 (May 30, 1997); In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, Notice of Proposed

gave rise to NAB's original petition for rulemaking. The LCG Tower opponents have raised a litany of issues such as RF radiation, compliance with NEPA, obstruction lighting and marking, and blanketing interference—all of which are comprehensively regulated at the federal level. Even at the federal level, this proceeding has now lasted more than a year and the Commission is still accepting comments on ACHP's frivolous and non-substantive two-page letter. It is easy to see that these issues, if raised at the state and local level, will invariably lead to protracted administrative proceedings and litigation as local opponents raise specious arguments (such as concerns regarding RF radiation) which are dealt with comprehensively by federal regulations.

It will benefit all parties to such proceedings and, consequently, serve the public interest, for the Commission to remove from state and local debate issues which are comprehensively regulated at the federal level. Likewise, it would well serve the public interest for the Commission to provide reasonable procedural constraints on state and local action so that the federal interest in ensuring the swift roll-out of digital television in particular and the advancement of radio communications service in general will be promoted.

The Commission has recognized in the context of its DTV proceeding that the paramount goal of DTV is the preservation of free, universal broadcasting service:¹⁸

First, we wish to promote and preserve free, universally available, local broadcast television in a digital world. Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast

Rule Making, MM Docket No. 97-182 (Released: Aug. 19, 1997).

¹⁸ Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Fifth Report and Order*, MM Docket No. 87-268, FCC 97-116 (Released: April 21, 1997), ¶ 1 ("*Fifth Report and Order*"). See also *Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry*, MM Docket No. 87-268, 10 FCC Rcd 10541 (Released: April 21, 1995) ("*Fourth Further Notice/Third Inquiry*"), at 10541.

television's unique benefit: free, widely accessible programming that serves the public interest. DTV will also help ensure robust competition in the video market that will bring more choices at less cost to American consumers. Particularly given the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to encourage broadcasters to offer digital television *as soon as possible*.¹⁹

This goal recognizes the Commission's statutory mandate to "make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."²⁰ It is also a reflection of the undeniable fact that "broadcast television has become an important part of American life."²¹

In order to preserve free, over-the-air television, the Commission has recognized that television broadcasters must convert their facilities to digital.²² As the Commission stated in its *Fifth Report and Order* in the DTV proceeding, "[o]nly if DTV achieves broad acceptance can we be assured of preservation of broadcast television's unique benefit: free, widely accessible programming that serves the public interest."²³ The Commission has further recognized that the conversion to digital television may not be successful unless DTV is implemented aggressively and quickly:

[D]igital television stands a risk of failing unless it is rolled out quickly. . . . Unless digital television is available quickly, other digital

¹⁹ *Fifth Report and Order*, ¶ 5 (emphasis added).

²⁰ Communications Act of 1934, as amended, § 1 (47 U.S.C. § 151).

²¹ *Fifth Report and Order*, ¶ 19 (citing *Fourth Further Notice/Third Inquiry*, at 10543).

²² *Id.*, ¶ 1.

²³ *Id.*, ¶ 5.

services may achieve levels of penetration that could preclude the success of over-the-air, digital television. Viewers who have leased or purchased digital set-top boxes from competing digital media may be less likely to purchase DTV receivers or converters. If digital, over-the-air television does not succeed, however, viewers will be without a free, universally available digital programming service.²⁴

The facts in this case show that LCG has done everything possible to address legitimate local concerns regarding potential environmental and aesthetic effects of the proposed tower. Moreover, the facts show that the proposed facility is consistent with the Commission's longstanding policy favoring construction in established antenna farms. Nonetheless, local "NIMBY"²⁵ proponents have managed to delay the project for a substantial period of time by raising meritless concerns at the local and federal level, all of which undercut the national interest in the rapid conversion to DTV and efficient deployment of broadcast services.

Indeed, it is plain that three of the four network affiliates in Denver will, because of nothing more than intransigence on the part of local officials, be unable to meet the Commission's November 1, 1999, construction deadline. If the Commission continues to refuse to defend the federal interest against such dilatory local actions, it may well be that these stations will be unable to put their DTV facilities into service by November 1, 2000! As the Commission itself has observed, if such delays occur throughout the nation, "digital television stands a risk of failing."²⁶ NAB urges the Commission to move with dispatch to adopt a rule which will aid in the swift resolution of disputes concerning broadcast transmission facility construction and which will remove from consideration

²⁴ *Id.*, ¶ 80.

²⁵ NIMBY is an acronym for the attitude commonly adopted by opponents of communications towers: "not in my back yard!"

²⁶ *Fifth Report and Order*, ¶ 80.

at the state and local level issues, such as RF radiation, obstruction lighting and marking, and blanketing interference, which are comprehensively regulated at the federal level.

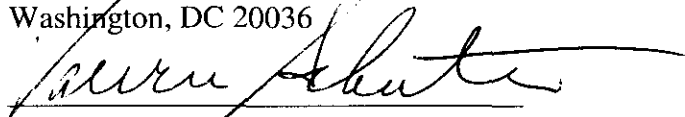
Conclusion

For the reasons expressed herein, the relief requested in ACHP's June 3, 1999, letter seeking reconsideration of the Commission's *Memorandum Opinion and Order* in this proceeding should be denied.

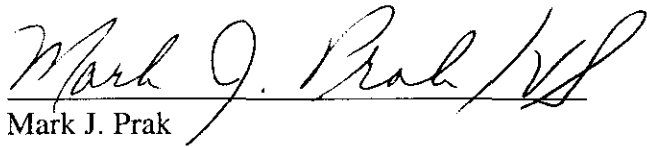
Respectfully submitted,

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I, Stacey Nelson, a Legal Secretary with the National Association of Broadcasters, do hereby certify that a copy of the foregoing Reply Comments was served by first class mail, U.S. postage prepaid, this 9th day of September, 1999 to the following:

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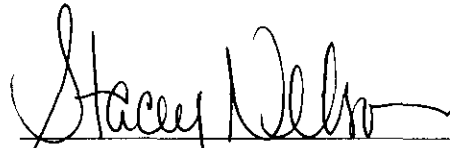
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